

134-12/MFM
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN ADMIRALTY

In the Matter of the

Complaint of Plaintiffs, McALLISTER
TOWING & TRANSPORTATION CO.,
INC. as Owner and McALLISTER
TOWING OF NEW YORK, LLC, as Owner
Pro Hac Vice of the Tug PATRICE
McALLISTER for Exoneration from/or
Limitation of Liability

**PETITIONERS/PLAINTIFFS’
RESPONSE TO OHIO
MACHINERY COMPANY d/b/a
OHIO CAT’S CLAIM
DATED AUGUST 16, 2012 WITH
COUNTERCLAIM**

12 Civil 2505 (LAK)

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McALLISTER TOWING & TRANSPORTATION CO., Inc. as Owner and
McALLISTER TOWING OF NEW YORK, LLC, as Owner Pro Hac Vice of the Tug PATRICE
McALLISTER (hereinafter referred to as “McALLISTER”) by their attorneys, Freehill, Hogan
& Mahar LLP, responds to Ohio Machinery Company d/b/a Ohio CAT’s (hereinafter referred to
as “Ohio CAT”) Claim dated August 16, 2012 upon information and belief as follows:

FIRST: McALLISTER admits the allegations contained in paragraphs numbered “1,”
“2,” “3,” “6,” “7,” “11,” “12,” “13,” “16,” “17” and “21,” of Ohio CAT’s Claim.

SECOND: McALLISTER denies any knowledge or information to form a belief as to
each and every allegation contained in paragraphs numbered “5,” “8,” “9,” “14” and “19” of

Ohio CAT's Claim except admits that the PATRICE McALLISTER is a vessel, with Official Number 1082214 and a Coast Guard Documented gross tonnage of 149 tons, and admits that Eduardo Escobedo, Fleet Engineer for McAllister Towing, was present at Ironhead Marine Inc's shipyard in Toledo, Ohio during portions of the tug's overhaul period.

THIRD: McALLISTER denies each and every allegation contained in paragraphs numbered "18," "20," "22," "24," "25," "27" and "28" of Ohio CAT's Claim except admits that on or about March 24, 2012 the tug departed Ironhead Marine Inc.'s shipyard in Toledo, Ohio after Ohio CAT had worked on overhauling the tug's engines, and admits that present available information indicates that a cause or contributing cause of the reported fire was a cracked threaded pipe connecting to the pre-lube oil pump to the tug's port engine.

FOURTH: Answering paragraph numbered "4," "10," "15," "23" and "26" of Ohio CAT's Claim, McALLISTER repeats and reiterates each and every answer and denial contained in paragraphs numbered "FIRST through THIRD" inclusive of its Response to Ohio CAT's Claim with the same force and effect as though fully set forth at length herein.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

FIFTH: In the event that this Honorable Court lacks jurisdiction over Ohio CAT, then this action should be transferred to Ohio federal court pursuant to 28 U.S.C. 1404(a) or other statute as may be applicable.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

SIXTH: The incident onboard the tug PATRICE McALLISTER, including any loss, damages and/or injuries to persons onboard the tug, were not the result of any negligence, fault

or want of due care or due diligence on the part of McALLISTER, but were instead due to the breach of contract, breach of warranty, breach of warranty of workmanlike performance, negligence, omissions and/or other culpable conduct of Ohio CAT, its employees or agents.

AS AND FOR A COUNTERCLAIM AGAINST OHIO CAT

SEVENTH: In addition to seeking contribution and indemnity from Ohio CAT with regard to the HOBAN claim, McALLISTER also makes the following Counterclaim.

EIGHTH: This is a case within the admiralty and maritime jurisdiction of the United States and the Counterclaim herein is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

NINTH: This Court has original jurisdiction in this action pursuant to 28 U.S.C. Section 1333, as the claim involves a contract to repair a vessel and a vessel casualty upon navigable waters.

TENTH: Venue in this district is proper pursuant to 28 U.S.C. Section 1391, because the vessel involved in this action is located within this district and because Ohio CAT has voluntarily appeared in the instant action.

ELEVENTH: At all material times, Counterclaimants were corporations organized and existing under the laws of the State of Delaware with their principal places of business in the State of New York.

TWELFTH: At all material times, McAllister Towing & Transportation Co., Inc. was the registered owner of the Tug PATRICE McALLISTER. McAllister Towing of New York, LLC was the charterer of the tug PATRICE McALLISTER which manned, supplied and navigated the vessel, and therefore was an "owner" pursuant to 46 U.S.C. 30501.

THIRTEENTH: The Tug PATRICE McALLISTER Official Number 1082214 is a vessel with a gross tonnage of 149 tons.

FOURTEENTH: Upon information and belief, Ohio CAT was and still is a corporation duly organized and existing under the laws of the State of Ohio.

FIFTEENTH: Upon information and belief, Ohio CAT does business in New York.

SIXTEENTH: Upon information and belief, Ohio CAT is subject to jurisdiction in New York by virtue of New York's long arm statute, C.P.L.R. Section 302.

SEVENTEENTH: Upon information and belief, Ohio CAT was and still is a subsidiary, agent, authorized dealer, service company, re-manufacturer and/or repairer for equipment and engines of Caterpillar, Inc.

EIGHTEENTH: On or about January 27, 2012, the tug PATRICE McALLISTER arrived at Ironhead Marine Inc.'s ("Ironhead") shipyard, and remained there until March 24, 2012.

NINETEENTH: While the tug PATRICE McALLISTER was at Ironhead, Counterclaimants contracted with Ohio CAT to conduct repairs, inspect and overhaul the tug's engines, including the pre-lube oil pumps and associated components.

TWENTIETH: Ohio CAT did in fact conduct repairs, inspect and overhaul the tug's engines, including the pre-lube oil pumps and associated components.

TWENTY-FIRST: While overhauling the engines, Ohio CAT did in fact disassemble and disconnect the pre-lube oil pumps and associated components; did in fact store the pre-lube oil pumps and associated components, and did in fact reassemble and reconnect the pre-lube oil pumps and associated components.

TWENTY-SECOND: Ohio CAT inspected and examined the pre-lube oil pumps and associated components while overhauling the engines.

TWENTY-THIRD: Ohio CAT observed the pre-lube oil pumps and associated components while overhauling the engines.

TWENTY-FOURTH: Ohio CAT handled the pre-lube oil pumps and associated components while overhauling the engines.

TWENTY-FIFTH: Ohio CAT changed the configuration of the pre-lube oil pumps and associated components while overhauling the engines.

TWENTY-SIXTH: Ohio CAT damaged the pre-lube oil pumps and associated components during the time period in which the engines were overhauled.

TWENTY-SEVENTH: Ohio CAT completed its work on the tug's engines, pre-lube pumps and associated components without ever advising Counterclaimants that there were any problems with the design, configuration, or condition of the tug's pre-lube pumps or associated components.

TWENTY-EIGHTH: The Tug PATRICE McALLISTER departed Ironhead bound for New York at or about 2000 hours (8:00 p.m.) on March 24, 2012.

TWENTY-NINTH: Approximately 56 hours later, or at about 0200 hours (2:00 a.m.) on March 27, 2012, while underway at sea, a fire broke out in the tug's engine room resulting in personal injuries to the crew, the death of Matthew Hoban, damage to the tug and consequential damages.

THIRTIETH: Upon information and belief, a cause or contributing cause of the fire was a cracked threaded pipe which connected the port pre-lube oil pump to the tug's port engine.

THIRTY-FIRST: Ohio CAT had disconnected, stored and reconnected said threaded pipe while performing its work on the tug's port engine.

THIRTY-SECOND: Ohio CAT had inspected and examined said threaded pipe while performing its work on the tug's port engine.

THIRTY-THIRD: Ohio CAT had observed said threaded pipe while performing its work on the tug's port engine.

THIRTY-FOURTH: Ohio CAT had handled said threaded pipe while performing its work on the tug's port engine.

THIRTY-FIFTH: Ohio CAT had changed the configuration of said threaded pipe while performing its work on the tug's port engine.

THIRTY-SIXTH: Ohio CAT had damaged said threaded pipe while performing its work on the tug's port engine.

THIRTY-SEVENTH: The fire and damages resulting therefrom were not caused or contributed to by any fault or negligence on the part of counterclaimants, but were caused wholly by, and due solely to, the breach of contract, breach of warranty, breach of warranty of workmanlike performance, negligence, omissions and/or other culpable conduct of Ohio CAT, its employees, agents, representatives, assigns and/or others acting on its behalf.

THIRTY-EIGHTH: By reason of the fire and resulting damages the tug PATRICE McALLISTER sustained damages in the approximate amount of \$3,700,000. Counterclaimants have also sustained damages for towing costs, loss of personal effects, loss of vessel equipment, fuel, tackle, gear supplies and appurtenances and other substantial damages including, but not limited to the \$134,880 cost of settling the claims of the surviving crewmembers.

WHEREFORE, McALLISTER demands judgment against Ohio CAT for:

- i) the hull engine and machinery damages in the approximate amount of \$3,700,000;
- ii) towing costs; (approximately \$312,000);
- iii) cost of lost personal effects; (\$20,000)
- iv) cost of settling claims of five surviving crewmembers (\$134,880); and
- v) other substantial damages;

plus interest, costs and attorneys' fees.

Dated: October 16, 2012

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